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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-51

GOODFRIEND WESTERN CORP.,
D/B/A WRANGLER WRANCH,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Goodfriend Western Corp., d/b/a Wrangler Wranch, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the First Circuit, entered on May 6, 1976, reversing an order of the District Court for the District of Massachusetts dated February 23, 1976, which order required the Respondent National Labor Relations Board, through its General Counsel, to furnish Petitioner with copies of cer-

tain affidavits and statements pursuant to provisions of the Freedom of Information Act, Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54, as amended by Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564, 5 U.S.C. § 552.

Opinions Below

The opinion of the Circuit Court of Appeals is reported at — F.2d —, 92 LRRM 2461 (1st Cir., 1976), and is reproduced in full in Appendix A, *infra,* pp. 25-27. The opinion of the District Court is reported at 411 F.Supp. 454 (D. Mass., 1976), and is reproduced in full in Appendix B, *infra,* pp. 28-38.

Jurisdiction

The decree of the Circuit Court of Appeals was entered May 6, 1976. Upon Petitioner's Motion For Stay Of Mandate, the Circuit Court of Appeals stayed its decree pending the filing and disposition of a petition for a writ of certiorari. By order entered June 15, 1976, the Circuit Court further stayed its mandate until July 15, 1976. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code, Act of June 25, 1948, c. 646, 62 Stat. 928.

Questions Presented

1. Whether the Circuit Court of Appeals erred in holding as a matter of law, that affidavits and statements of individuals whom Respondent intended to call as witnesses in a complaint proceeding were exempt from disclosure as "investigatory records compiled for law enforcement purposes" the production of which would "interfere with enforcement proceedings", pursuant to Section 7(A) of 5 U.S.C. § 552(b).

2. Whether said documents are exempt from disclosure pursuant to Section 5 or Sections 7(C) or (D) of 5 U.S.C. § 552(b).

Statutes Involved

The full text of the Freedom of Information Act, Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54, as amended by Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564, 5 U.S.C. § 552, is set forth in Appendix C, *infra,* pp. 39-47. Pertinent portions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* and the National Labor Relations Board's Rules and Regulations, 29 C.F.R., Section 102.117 *et seq.* are set forth in Appendix C, *infra,* pp. 47-54.

Statement of the Case

The Petitioner is a wholly owned subsidiary of Goodfriend Western Corporation, engaged in the retail sale of clothing in the Boston, Massachusetts, metropolitan area. On October 3, 1975, Local 1291, Retail Store Employees Union (a/w Retail Clerks International Association, AFL-CIO), filed a charge with the National Labor Relations Board ("the Board"), alleging that Petitioner had engaged in certain unfair labor practices. Following investigation of the charge, on December 3, 1975 the Regional Director for the Board, acting in behalf of General Counsel of the Board, issued a complaint against Petitioner pursuant to Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b), charging Petitioner with violations of Sections 8(a)(1), (3) and (5) of said Act, 29 U.S.C. §§ 158(a)(1), (3) and (5). The complaint alleged, *inter alia,* that Petitioner had violated Section 8(a)(3) of the Act by discharging certain named employees for engaging in protected activities and had refused to recognize the union as the lawful designated representative in a unit appropriate for collective bargaining, in violation of Section 8(a)(5). A hearing before an Administrative Law Judge of the Board was scheduled for February 24, 1976.

On December 29, 1975 the Petitioner requested the Regional Director to make available for inspection and copying, pursuant to 5 U.S.C. § 552, "all written statements, signed or unsigned, contained in the Regional case file, resulting from Board interviews of witnesses offered by the charging party or otherwise resulting from investigation of the charge."[1] On December 30, 1975, the Acting Regional Director denied the Petitioner's request on the grounds that the information requested was exempt from disclosure pursuant to Sections 7(A), (C) and (D) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(7)(A), (C) and (D). On December 31, 1975, the Petitioner appealed to the General Counsel of the Board from the Regional Director's denial of its request for access to such agency records. On February 2, 1976, General Counsel of the Board denied the Petitioner's appeal. In addition to the grounds relied on by the Acting Regional Director, General Counsel denied Petitioner's appeal on the ground that 5 U.S.C. § 552(b)(5) exempted the affidavits from disclosure.

Having exhausted the administrative process,[2] the Petitioner brought suit in the United States District Court for the District of Massachusetts, pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B), to compel production of the affidavits and to enjoin Respondent from proceeding against Petitioner in the complaint case until such time as Respondent allowed Petitioner access to the requested records.

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[1] Letter from attorney for Petitioner, dated December 29, 1975 (Appendix D, *infra*, p. 55).

[2] In his letter of February 2, 1976, denying Petitioner's appeal, General Counsel stated:

> "Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B)." (Appendix D, *infra*, pp. 56-58). *See* Section 102.117(c)(2)(ii) of the Board's Rules and Regulations, Series 8, as amended. 29 C.F.R. § 102.117(c)(2)(ii) (Appendix C, *infra*, pp. 49-51).

The District Court heard oral arguments and accepted Memoranda of Law on behalf of the parties, and, pursuant to 5 U.S.C. § 552(a)(4)(B), examined the affidavits *in camera*. On February 23, 1976, the District Court issued its order directing Respondent to furnish Petitioner with copies of all written affidavits of persons Respondent intended to call as witnesses in the complaint proceeding, the hearing in which was scheduled for the next day, February 24, 1976. The District Court further directed that Respondent through the General Counsel and Regional Director be enjoined from prosecuting the complaint until such time as Respondent complied with the Court's order. In its opinion the District Court rejected Respondent's contention that the statements were exempt from disclosure under 5 U.S.C. § 552(b)(5) or (7)(A)(C) or (D).

Respondent appealed the order of the District Court to the Court of Appeals for the First Circuit, on March 1, 1976. On March 5, 1976, Respondent filed a Motion for Summary Reversal of the District Court decision. Pursuant to Motion filed by Petitioner the Circuit Court of Appeals ordered the hearing on the merits of the appeal consolidated with the hearing on Respondent's Motion for Summary Reversal. The Court of Appeals heard oral argument on April 6, 1976 and on May 6, 1976 issued its decree, reversing the judgment of the District Court, solely on the basis of its findings that the affidavits were exempt under § 552(b)(7)(A) and did not reach the question of the applicability of exemptions contained in § 552(b)(5) or (7)(C) or (D).

Reasons for Granting the Writ

I. This Case Presents an Important Question of Law Over Which the Federal District Courts Have Divided.

This Court recently had occasion to consider the application of the Freedom of Information Act to the National

Labor Relations Board, in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The question presented in that case was whether Advice and Appeals Memoranda of General Counsel were exempt from disclosure by virtue of Section 5 of 5 U.S.C. § 552(b). The Court held that any such Memoranda relating to decisions of the General Counsel not to issue a complaint were "final opinions" made in the adjudication of a case, and thus fell outside the scope of the exemption in 5 U.S.C. § 552(b)(5), while those Memoranda which explained decisions of General Counsel to issue a complaint and commence litigation before the Board were exempt from disclosure.

Although *Sears* did not deal with disclosure of witnesses' affidavits, and the Court declined to consider whether the exemptions contained in 5 U.S.C. § 552(b)(7) protected Advice and Appeals Memoranda from disclosure, the opinion of the Court in that case supports the position of the Petitioner and decision of the District Court below.

At the outset of its opinion in *Sears* the Court noted:

> "the [Freedom of Information] Act seeks 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' S. Rep. No. 813, 89th Cong. 1st Sess., 3 (1965) (hereinafter S. Rep. No. 813); EPA v. Mink, supra, at 80." 421 U.S. at 132

Moreover in declining to consider General Counsel's argument that the Advice and Appeals Memoranda were exempt under 5 U.S.C. § 552(b)(7), the Court stated:

> "The legislative history clearly indicates that Congress disapproves of those cases, relied on by the General Counsel, see n. 28, supra, which relieve the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7. Conference Report No. 93-1200, 93d Cong. 2d Sess. (1974) (Conference Report). The language of the amended Exemption 7 and the legislative history underlying it clearly reveal a congressional intent to limit application of Exemption 7 to agency records so that it would apply only to the extent that 'the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures'. " 421 U.S. at 164-65

Unlike *Sears*, the applicability of Exemption 7 is squarely in issue in the instant case. Moreover, since *Sears* the question of the extent to which Exemption 7 protects various documents of the NLRB from disclosure has been fully litigated in the district courts. The lower court decisions are conflicting, however,[3] and the spate of FOIA litigation involving the NLRB continues unabated. In an address before New York University's Annual Conference on Labor, on May 17, 1976, John S. Irving, NLRB General Counsel, noted:

> "[I]n March of 1976, the Office of Appeals with delegated authority to handle FOIA appeals to the Agency's General Counsel, responded to 70 such appeals. And, during the early months of 1976, complaints were filed in district courts around the country seeking the production of Board records under the FOIA at the rate of approximately 20 a month . . . Moreover, virtually all of the court actions against the Board under the FOIA during the past year have

[3] *See* Appendix E, *infra*, pp. 59-61.

been filed by parties to Board proceedings seeking access to the Board's investigatory files."

(Reported in White Collar Report No. 997, page C-1, *et seq.*, published by the Bureau of National Affairs, May 21, 1976).

Unlike the issue in *Sears*, the question in this case is one which is apt to arise daily, in every complaint proceeding instituted by the NLRB. In light of this fact, and considering the split among the lower federal courts, this Court should now resolve the issue of Exemption 7's application to witness statements in the Board's possession under the circumstances attendant in the case at bar.

II. The Decision of the Court of Appeals Must Be Reversed Inasmuch as It Is Founded on a Construction of the Freedom of Information Act Which Is Contrary to the Language and Legislative History of That Statute.

The legislative history of the Freedom of Information Act, as originally passed, and of the amendments effected by Congress in 1974, clearly supports the construction of the Act arrived at by the District Court below. In its Report on S. 1160 (which was ultimately enacted as the Freedom of Information Act), the Senate Judiciary Committee emphasized the importance of providing for "full agency disclosure", while at the same time recognizing the need to protect certain legitimate government interests as confidential.

> "It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the

> interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, *yet places emphasis on the fullest responsible disclosure.*" S. Rept. No. 813, 89th Cong., 1st Sess., at p. 3 (Oct. 4, 1965). (Emphasis added).

The Judiciary Committee emphasized that the burden of proof lay with the agency seeking to prevent disclosure (S. Rept. No. 813, *supra*, at p. 8). *See also*, H. Rept. No. 1997, 89th Cong., 2d Sess. (May 9, 1966).

The original Exemption 7 protected from disclosure

> "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

In *Sears*, this Court observed in a footnote that one of the purposes of this exemption as originally enacted

> "would appear to be 'to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court.' " 421 U.S. at 163, n. 28.

However, the language of the exemption, *as amended*, reads quite differently:

> "(7) investigatory records compiled for law enforcement purposes, *but only to the extent that* the production of such records would (A) interfere with enforcement proceedings." (Emphasis added).

In the floor debates preceding enactment of the 1974 amendments, Senator Hart explained this change in the language of Exemption 7 as follows:

> "Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. *The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.*
>
> *"That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966.* Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering.
>
> * * *
>
> "Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But *the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.*
>
> "Let me clarify the instances in which nondisclosure would obtain: First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court —a concrete prospective law enforcement proceeding— would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the

> agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. *In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding."* 120 Cong. Rec. 9329-9330 (daily ed., May 30, 1974) (Emphasis added).

Thus, the intent of Congress was clearly to require an agency seeking exemption under Section 7(a) of 5 U.S.C. § 552(b) to bear the burden of proving that disclosure would cause some actual interference with a specific enforcement proceeding. To carry this burden, the agency must show either that its "case in court" would suffer from the premature release of "evidence or information not in the possession of known or potential defendants," or, that disclosure would *substantially* harm such proceedings by impeding any preliminary investigation. Senator Hart's remarks also underscore that an agency may not bring itself within the scope of this exemption merely by alleging harm of a speculative or non-specific nature: "it is only relevant to make such a determination in the context of the particular enforcement proceeding." As the district court observed in *Maremont Corporation* v. *NLRB*, — F. Supp. —, 91 LRRM 2804, at 2810 (D. Okla. 1976):

> "It is true that F.O.I.A. disclosure may inconvenience defendant. However, inconvenience is not synonymous with Exemption (7) "interference." Defendant's prosecutive task may become somewhat more exacting; its witnesses will have to be more scrupulous in their attention to the truth; they will have to be better able to withstand knowledgeable cross-

examination. But such difficulties are not what the amended exemption contemplated . . ."

The court quoted Senator Weicker's remarks from the floor debates preceding enactment of the amendments:

> "Yes, it is going to make the job of the law enforcement agencies more difficult in that it brings them out in the open. But let me assure you, the far greater danger lies behind closed doors and locked files." (120 Cong. Rec. S. 9335, May 30, 1974).

Finally, the court observed:

> "The ruling of this Court will not prevent defendant from presenting its strongest case in its administrative hearing. Rather defendant will be compelled to do so. *Defendant should not be able to prevail simply by virtue of a cross-examination or defense weakened by lack of foreknowledge. If defendant is to succeed in its administrative hearings, it should be because of the strengths of its own case, not the Board-fostered weakness of its opponent's.* Defendant's position here runs afoul of the observation of the Supreme Court to the effect that the interests of Government prosecutors should be not that he 'shall win a case, but that justice will be done.' Berger v. United States, 295 U.S. 78, 88 (1935).
>
> For these reasons, this Court holds that the witness statements in issue here are not exempt from disclosure under Exemption 7(A)." — F.Supp. —, 91 LRRM at 2810 (Emphasis added)

It should also be noted that Senator Hart's remarks specifically indicate that evidence in an agency's enforce-

ment proceeding is not entitled to any greater consideration under the exemption than are non-evidentiary materials.

Another significant result of the amendments was to add a provision for *in camera* inspection of agency records by the district court in which suit is brought to compel disclosure. 5 U.S.C. § 552(a)(4)(B). This was in direct response to this Court's decision in *EPA* v. *Mink,* 410 U.S. 73, 94 (1973) that absent specific directions from Congress the courts could not examine the contents of documents withheld under 5 U.S.C. § 552(b)(1) of the original act. 120 Cong. Rec. 9313 (daily ed. May 30, 1974 — remarks of Senator Kennedy).

In this regard Senator Kennedy stated:

> "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. The Senate report in this respect cites with approval the type of procedure set out in the District of Columbia Court of Appeals in the case of Vaughn against Rosen, requiring the Government to sustain its burden of justifying its withholding of each element of a contested file or record. That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure. This should result in maximum possible disclosure and is consistent with the original congressional purpose in enacting the Freedom of Information Act." 120 Cong. Rec. 9315

This emphasis on the availability of *in camera* review quite obviously was intended to ensure that agencies seek-

ing exemption would be required to *prove* (in the case of exemption 7(a)) *actual* harm to a *specific* enforcement proceeding.

The documents which Petitioner sought access to were affidavits and statements of witnesses Respondent intended to call in the complaint proceeding. The District Court ordered their disclosure one day prior to the hearing scheduled by Respondent in that case. Respondent agreed that pursuant to the Board's Rules and Regulations[4] Petitioner would be permitted to examine these affidavits immediately after said witnesses had testified (Opinion of the District Court, Appendix B, *infra,* p. 34)

The Court examined the affidavits *in camera,* and ultimately concluded that Respondent had failed to maintain its burden of proving that disclosure would interfere with the enforcement proceedings to be begun the next day:

> "No evidence was offered by defendants specifying the harm which would fall upon the N.L.R.B. by a compelled disclosure of these affidavits on Monday, February 23, 1976 instead of the following morning." (Appendix B, *infra,* p. 34)

The Court of Appeals for the First Circuit did not squarely rebut the reasoning of the District Court. Rather, it chose to adopt the reasoning of the Court of Appeals for the Second Circuit in *NLRB* v. *Title Guarantee,* — F.2d —, 91 LRRM 2993 (2d Cir., 1976),[5] as well as that court's conclusion that "all statements of employees obtained in connection with unfair labor practice proceedings pending before the NLRB are exempt from disclosure under 5 U.S.C. § 552(b)(7)(A)."

The Second Circuit reasoned that disclosure of witnesses'

[4] Section 102.118(b)(1), 29 C.F.R. § 102.118(b)(1), Appendix C, *infra,* p. 53.

[5] Petition for Certiorari pending.

affidavits "could well" result in interference with the Board's enforcement proceedings, in two ways:

> "first, suspected violators *might be able to use disclosure* to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; [and] second, employees who are interviewed *may be reluctant,* for fear of incurring employer displeasure, to have it known that they have given information, . . . or union officials *might not want to volunteer information* for fear of compromising the union's position in negotiations . . . ." — F.2d at —, 91 LRRM at 2998 (Emphasis added)

The court held, in effect, that a *probability* of *possible* interference with the Board's enforcement proceedings was sufficient to exempt the affidavits from disclosure.

Petitioner had argued before the Court of Appeals that the court's reasoning in *Title Guarantee* was inapplicable to the instant case. With respect to the first point—that by learning the Board's case in advance suspected violators might be able to frustrate the proceedings—Petitioner pointed out that the disclosure ordered by the District Court would not enable it to "frustrate the Board's proceedings", inasmuch as less than twenty-four hours remained before the time set for hearing in the Board's unfair labor practice case. With respect to the second reason advanced by the court in *Title Guarantee,* Petitioner argued that inasmuch as the employees from whom the Board might have obtained affidavits were not longer employed by it they could not possibly be subject to "employer displeasure". Moreover, inasmuch as the Board's complaint alleged that they had been discharged for union activities, and one of the remedies sought was reinstatement with back pay, these employees were all parties in

interest to the underlying proceedings, and were named in the Board's complaint. Finally, the National Labor Relations Act itself protects employees from employer reprisals for having testified in Board proceedings or having given evidence in support of charges.[6]

During oral argument before both the District Court and Court of Appeals, Petitioner urged that allowing it to examine the affidavits and statements in the Board's possession would facilitate the possibility of settlement of the unfair labor practice charge. Subsequently, in his address to the New York University Conference on Labor, *supra,* General Counsel for the Board stated the following as desirable preconditions to disclosure:

> "First, the result of such disclosures must be to speed rather than delay the agency's processes.
>
> "Second, disclosure must, in fact, result in the settlement of more cases prior to litigation.
>
> "Third, methods must be devised to insure against any opportunity for the intimidation of witnesses and to avoid deterring potential witnesses from cooperating in future investigations.
>
> "Fourth, any form of pre-trial disclosure must work both ways, providing the General Counsel with reciprocal access to information."[7]

Settlement would have fulfilled the first two conditions suggested by Irving, and the third condition is met on the facts of this case, as already argued, *supra.*

In rejecting Petitioner's argument that the instant case was distinguishable from *Title Guarantee,* the First Circuit held:

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[6] 29 U.S.C. § 158(a)(4). Appendix C, *infra,* p. 48.
[7] White Collar Report No. 997, *supra.*

> "While it may well be that the circumstances minimize the *possible* interference with the pending proceedings, the present order is nonetheless controlled by the reasoning in *Title Guarantee.* Even in this case ***we cannot rule out all possibility*** that the company may "be able to use disclosure to learn the Board's case in advance and frustrate the proceedings. . . ." *Title Guarantee, supra,* slip op. at 2971; *see id,* at 2972. More important, ***whether such a possibility justifies denying all discovery of an employee's statements until after he testifies is a question that Congress has left to the Board.*** As the Second Circuit said,
>
> > 'In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. . . .'
>
> *Id.* at 2974. Whatever our own view of the desirability of disclosure in this instance, we do not believe that Congress intended to transfer from the Board to the courts the case-by-case adjudication of discovery disputes in unfair labor practice proceedings. Hence, we hold that the affidavits whose production was ordered are protected from disclosure by § 552(b)(7)(A)." Appendix A, *infra,* p. 27. (Emphasis added)

The reasoning of both courts of appeal suffers in several respects. First of all, the conclusion that "*all* statements of employees" are exempt from disclosure is clearly counter to the congressional intent that *each* claim of exemption

in *each* particular case be examined independently. The Second Circuit's blanket exemption wholly ignores the evidence in the legislative history that Congress intended by its amendments to the Act to require an agency to prove actual harm to a specific enforcement proceeding in order to obtain exemption under Section 7(A).

Secondly, the First Circuit erred when it said "Even in this case we cannot rule out all possibility that the company may be able to use disclosure to learn the Board's case in advance, and frustrate the proceedings. . . ." The court thus placed the burden on Petitioner to disprove the possibility that disclosure might enable it to frustrate Respondent's enforcement proceedings. In other words, the Court of Appeals was indulging in a presumption that disclosure *would* enable Petitioner to frustrate such enforcement proceedings. But such a presumption is clearly foreclosed by the legislative history, and by specific language in 5 U.S.C. § 552(a)(4)(B), which states that "the burden is on the agency to sustain its action."

Finally, the Court of Appeals sought to excuse its failure to grapple with Respondent's lack of evidence of specific interference to its enforcement proceeding by claiming that Congress had left it to the Board to determine whether such a possibility (of interference) justified denial of *all* discovery of employees' statements:

> "[W]e do not believe that Congress intended to transfer from the Board to the Courts the case-by-case adjudication of discovery in unfair labor practice proceedings."

This assertion of a negative intent on the part of Congress finds no support in the legislative history. To the contrary, the legislative history is replete with indications that Congress *did* intend to remove the case-by-case adjudi-

cation of discovery disputes from the hands of the agencies and place them in the hands of the courts.

The decision of the First Circuit Court of Appeals, as well as the decision of the Court of Appeals for the Second Circuit in *Title Guarantee,* has a grave import. Congress added the provisions of the so-called Freedom of Information Act to those in the Administrative Procedure Act because the latter had proved ineffective to remedy the "obstinate" refusal of various government agencies to allow the public access to government-held information. When the Freedom of Information Act itself was found to lack efficacy, Congress felt compelled to act once again. At one blow, the Court of Appeals has rendered ineffective two consecutive attempts of Congress to provide for the free flow of public information. The reasoning of the Court of Appeals would require Congress to specify in every possible type of disclosure situation before every government agency the amount and kind of disclosure allowed. Such an approach to the legislative task is clearly unworkable.

On the basis of all of the foregoing it is submitted that the reasoning and conclusions of the Court of Appeals reflect an incorrect interpretation of the Freedom of Information Act, and lead to an unlawful denial of Petitioner's rights under that Act.

III. The Statements Are Not Exempt From Disclosure Under Section 5 and Sections 7(C) and (D) of 5 U.S.C. § 552(b).

The Board in both the instant case and *Title Guarantee* claimed exemption of witnesses' statements under Section 5 and Sections 7(C) and (D), as well as Section 7(A) of 5 U.S.C. § 552(b). Having decided that such statements were protected from disclosure under Exemption 7(A),

both the Court of Appeals for the Second Circuit in *Title Guarantee* and the First Circuit in the instant case declined to rule on the Board's other claims of exemption. However, both Judge Gagliardi in *Title Guarantee* (Southern District, New York) and Judge Tauro in the instant case (District, Massachusetts) ruled that such affidavits were not exempt under 5 U.S.C. §§ 5, 7(C) or (D). Inasmuch as the Board has consistently claimed the protection of these other exemptions, this Court should now resolve these issues together with the issue of the applicability of Exemption 7(A).

A. *The Statements Are Not Exempt From Disclosure Under Exemption 7(C).*

Under exemption 7(C) investigatory records are exempt if disclosure would "constitute an unwarranted invasion of personal privacy." The courts have held that "personal privacy" in exemption 7(C) does not include the right to select the people to whom ideas are communicated but is instead limited to purely personal matters. *E.g., Rural Housing Alliance* v. *United States Department of Agriculture,* 498 F.2d 73 (C.A.D.C., 1974) (information concerning marital status, legitimacy of children, identity of father of children, medical conditions, welfare payments, alcoholic consumption, family rights).

After *in camera* inspection of the affidavits, the District Court below stated:

> "This court can state from its in camera review of the subject affidavits that they pertain only to the dispute between Local 1291 and the plaintiff. No matters of a personal nature involving any witness' right to privacy are involved." (Appendix B, *infra,* p. 36).

In the absence of an affirmative showing on the part of Respondent that disclosure would cause some specific interference with the affiants' privacy, the Act's usual presumption in favor of disclosure remains operative.

B. *The Statements Are Not Exempt From Disclosure Under Exemption 7(D).*

Under exemption 7(D) investigatory records are exempt from disclosure if they would "disclose the identity of a confidential source." However, in the instant case the witnesses whose affidavits are sought were all scheduled to testify the day after the District Court issued its order directing disclosure. As the District Court properly concluded, persons in such a position cannot in any sense of the word be deemed "confidential" sources:

> "Defendants state that they have told informants that their affidavits will not be made public unless and until they have testified at the N.L.R.B. hearing. They argue that this assurance has made these witnesses in some sense confidential sources. This court does not agree. The persons in question have committed themselves to testifying in public. At the time of the hearing on the instant matter the subpoenas for these witnesses had already issued (unless the agency felt confident the witness would not require one), and the hour of truth was virtually at hand. No accepted definition of the term "confidential" could at that point describe the persons whose affidavits this court has ordered revealed." (Appendix B, *infra,* p. 36).

In any event, with the possible exception of one nonsupervisory employee who is still in Petitioner's employ, no other nonsupervisory employee in the employ of the

Petitioner during the critical period of time is *currently* employed by Petitioner. Again, with one possible exception, employees who may have given statements in the course of the investigation of the charge have waived any claim of confidentiality in that the Board's complaint alleges all such employees were discriminatorily discharged by Petitioner. Accordingly, by the very issuance of the complaint the identity of the sources is a matter of public record and is no longer confidential. *See, e.g., Cessna Aircraft,* 405 F.Supp. 1042 (D. Kansas, 1975); *Hardeman Garment Corp.,* 406 F.Supp. 510 (W.D. Tenn., 1975); *Poss* v. *NLRB,* — F.Supp. —, 91 LRRM 2232 (D.D.C., 1975)

Nor may Respondents claim for their witnesses "the informer's privilege". The witnesses whose affidavits Petitioner seeks are not "informers". To the contrary, they are "parties in interest" in the underlying Board proceeding. Should General Counsel prevail in that proceeding, the remedy sought will be reinstatement of these employees with back pay. To refer to these individuals, then, as "informers" would be a gross mischaracterization.

C. *The Statements Are Not Exempt From Disclosure Under 5 U.S.C. § 552 (b)(5).*

In relying upon exemption (5), General Counsel of the Board stated:

> "Anytime an investigator takes an affidavit or statement during an unfair labor practice investigation, it is done in anticipation of a trial and thus must be viewed as the attorney's work product, which is not normally discoverable in our Agency's proceedings. See *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132. Moreover, even if the investigation did not warrant a finding that an unfair labor practice had ben committed, the affidavits and/or statements, as part of the attorney's work product, would still have to be used by the Regional Director in making the administrative determination of whether or not issuance of complaint was warranted. See *Brockway* v. *Dept. of the Air Force,* 518 F.2d 1184 (C.A. 8, 1969)." Appendix D, *infra,* p. 57.

However, Judge Gagliardi in *Title Guarantee*[8] disposed of this argument, as follows:

> "[T]he material requested consists solely of statements made in support of the Union's charges. See 29 C.F.R. § 1014. This material does not fall within the scope of the "memorandums or letters" exemption of Exemption 5. Whatever broad language exists in Sears or other cases, e.g., E.P.A. v. Mink, supra, equating Exemption 5 to civil discovery privileges was enunciated in the context of 'inter-agency or intra-agency memorandums or letters' or memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy'. Sears, supra, at 154, 89 LRRM at 2009. This court does not believe that such statements should be applied to carry Exemption 5 to the type of witness statements in question here."

In *EPA* v. *Mink,* 410 U.S. 73, 89 (1973), this Court stated:

> "[V]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other."

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[8] *Title Guarantee* v. *NLRB,* 407 F.Supp. 498 (S.D. N.Y., 1975).

In *Sears, supra,* the Court observed in connection with Exemption 5:

> "Since virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation, and since the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein . . ., it is reasonable to construe Exemption 5 to exempt those documents, *and only those documents,* normally privileged in the civil discovery context." 421 U.S. at 149.

The statements of witnesses are neither confidential in nature nor "deliberative or policy-making" materials. Quite clearly, such documents are purely factual materials which, to be exempt at all, must meet the criteria laid down in Exemption 7, and not Exemption 5.

A decision limited to Exemption 7(A) will not answer the questions raised with respect to Exemptions 5 and 7(C) and (D).

Conclusion

For the foregoing reasons, the Petitioner prays that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Attorney for Petitioner

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Dated July , 1976

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 76-1116

GOODFRIEND WESTERN CORP.,
D/B/A WRANGLER WRANCH,
PLAINTIFF, APPELLEE,

v.

ROBERT S. FUCHS, ETC., ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. JOSEPH L. TAURO, *U. S. District Judge*]

Before COFFIN, *Chief Judge,*
MCENTEE and CAMPBELL, *Circuit Judges.*

Abigail Cooley, Assistant General Counsel for Special Litigation, with whom *John S. Irving,* General Counsel, *John E. Higgins, Jr.,* Deputy General Counsel, and *Elliott Moore,* Deputy Associate General Counsel, were on memorandum in support of motion for summary reversal.

Harold N. Mack, with whom *Philip Moss* and *Morgan, Brown, Kearns & Joy* were on memorandum in support of opposition to motion for summary reversal.

May 6, 1976

PER CURIAM. This is an appeal from an order of the district court requiring the National Labor Relations Board to disclose affidavits that the Board had obtained from employees in connection with pending unfair labor practice proceedings at which the affiants were expected to testify, and enjoining the proceedings until after the required dis-

closure is made. For the reasons stated in *Title Guarantee Co.* v. *NLRB,* No. 75-6119 (2d Cir., April 2, 1976), we reverse.

This case parallels *Title Guarantee* in nearly all material respects. Plaintiff, a company faced with unfair labor practice charges, sought to obtain copies of all written statements in the NLRB's case file, first by filing a request with the regional director, then by appealing to the general counsel, and finally by bringing this action in the district court. Disclosure was sought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and resisted on the primary ground that the statements in question were exempt from the requirements of the Act as "investigatory records compiled for law enforcement purposes" whose production would "interfere with law enforcement proceedings" under 5 U.S.C. § 552(b)(7)(A). The district court examined the legislative history and concluded, citing the district court opinion in *Title Guarantee,* — F.Supp. — (S.D.N.Y. 1975), that the applicability of the claimed exemption must be decided on a case-by-case basis to determine whether the agency claim of "interference with law enforcement proceeding" was warranted. After an *in camera* inspection of the materials in question, the court concluded that the claims were not justified and accordingly ordered their disclosure.

In *Title Guarantee,* the second circuit, reversing the district court, held that all statements of employees obtained in connection with unfair labor practice proceedings pending before the NLRB are exempt from disclosure under § 552 (b)(7)(A). We adopt that holding here, and, having little to add to Judge Oakes' able opinion, with which we are in substantial agreement, confine ourselves to a discussion of the argument that this case is distinguishable.

In pressing this argument, plaintiff focuses on the timing and scope of the district court's order. Plaintiff points out, as did the district court, that the order is limited to affi-

davits of witnesses who had already committed themselves to testifying at a hearing that was scheduled to take place twenty-four hours after the order was issued. Even if *Title Guarantee's* holding is correct as a general proposition, plaintiff suggests, this case presents a worthy exception to the rule.

While it may well be that the circumstances minimize the possible interference with the pending proceedings, the present order is nonetheless controlled by the reasoning in *Title Guarantee.* Even in this case we cannot rule out all possibility that the company may "be able to use disclosure to learn the Board's case in advance and frustrate the proceedings . . . ." *Title Guarantee, supra,* slip op. at 2971; *see id.* at 2972. More important, whether such a possibility justifies denying all discovery of an employee's statements until after he testifies is a question that Congress has left to the Board. As the second circuit said,

> "In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. . . ."

Id. at 2974. Whatever our own view of the desirability of disclosure in this instance, we do not believe that Congress intended to transfer from the Board to the courts the case-by-case adjudication of discovery disputes in unfair labor practice proceedings.* Hence, we hold that the affidavits whose production was ordered are protected from disclosure by § 552(b)(7)(A).

Reversed.

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* *Cf. Sheehan* v. *Doyle,* 513 F.2d 895 (1st Cir.), *cert. denied,* — U.S. — (1975), where we pointed out the impracticality, in terms of delay and judicial and agency inefficiency, of splitting patent interference discovery proceedings between the patent office and the courts, and held that Congress under 35 U.S.C. § 24 did not intend such a result.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. 76-644-T

GOODFRIEND WESTERN CORP.
d/b/a WRANGLER WRANCH

v.

ROBERT S. FUCHS, Regional Director for Region One, National Labor Relations Board;
JOHN S. IRVING, General Counsel, National Labor Relations Board;
ROBERT E. ALLEN, Director Office of Appeals, Office of General Counsel, National Labor Relations Board;
and NATIONAL LABOR RELATIONS BOARD

OPINION
March 1, 1976

TAURO, D.J.

Plaintiff in this case, Goodfriend Western Corp., seeks to compel the National Labor Relations Board (N.L.R.B.) to disclose, pursuant to the Freedom of Information Act (the "Act"), 5 U.S.C. § 552, certain affidavits relating to an unfair labor practice charge against Goodfriend Western Corp. In addition, plaintiff seeks injunctive relief restraining the N.L.R.B. from conducting the pending proceedings on these charges until a reasonable time after such disclosure. After a full hearing on the merits, and *in camera* review of defendants' file,[1] this court has concluded that

[1] Defendants' file contained much material which is not relevant to the scope of this opinion and order. To disclose what documents in defendants' file are not covered herein would be to expose them by indirection. It is enough to say that this opinion and order are limited to the signed affidavits of persons who were scheduled to testify before the N.L.R.B. on February 24, 1976, one day following the issuance of this court's disclosure order.

the requested documents fall squarely within the parameters of the Act and are not covered by any of the exemptive provisions of 5 U.S.C. § 552(b). This being so, the court has ordered the defendants to disclose the requested documents and has enjoined them from proceeding with the action *"In the Matter of Goodfriend Western Corp., d/b/a Wrangler Wranch, and Local 1291, Retail Employees Union,* Case No. 1-CA-11,087," until they have made the required disclosure.[2]

I.

Counsel for all parties agree that there is no factual dispute in this matter.

On October 3, 1975, Local 1291, Retail Store Employees Union, associated with Retail Clerks International Association, AFL-CIO (hereinafter Local 1291) filed a charge with the defendant regional director, alleging violations by the plaintiff of various sections of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) and (5). The gist of these allegations is that the plaintiff has illegally interfered with the attempts of Local 1291 to form a union among plaintiff's workers. Nine workers have allegedly been permanently discharged by the plaintiff for their association with Local 1291.

On December 3, 1975 the defendant regional director issued a complaint against the plaintiff pursuant to Section 10(b) of the National Labor Relations Act as amended, 29 U.S.C. § 160(b), charging plaintiff with unfair labor practices. The complaint was set for hearing before an Administrative Law Judge of the National Labor Relations Board (N.L.R.B.) on February 24, 1976.

On December 29, 1975 the plaintiff requested that the

[2] Because proceedings in case No. 1-CA-11,087 were scheduled for February 24, 1976, a summary order was issued by this court on February 23. This opinion is intended to elaborate more fully the basis for that order.

defendant regional director make available for inspection and copying, pursuant to 5 U.S.C. § 552, "all written statements, signed or unsigned, contained in the Regional case file, resulting from N.L.R.B. interviews of witnesses offered by the Charging Party [Local 1291] or otherwise resulting from investigation of the charge." On December 30 this request was denied on the ground that the information requested was exempt from disclosure pursuant to certain provisions of the Act, 5 U.S.C. §§ 522(b)(5), and (7)(A), (C) and (D).

On December 31, 1975 this denial was appealed to the defendant general counsel of the N.L.R.B. On February 2, this appeal was denied.

With these requests and denials, plaintiff has exhausted its administrative remedies. *Rules and Regulations of the National Labor Relations Board,* Series 8, § 102.117(c), 29 C.F.R. § 102.117(c).

II.

The case presents two issues for determination; *first,* whether the Act requires disclosure of the documents; *second,* whether the remedial powers of this court, assuming disclosure is required, include the power to enjoin the agency proceeding.

With respect to the first issue, it is clear that the defendants do not enjoy any blanket exemption from the Act. *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1975). This court has jurisdiction to examine the requested documents, make a *de novo* determination of their status under the Act and, if appropriate, order their disclosure. 5 U.S.C. § 552(a)(4). The mere fact that the plaintiff in this case is a party in an action pending before the N.L.R.B. does not diminish its rights under the Act. *See Cessna Aircraft Co.* v. *N.L.R.B.,* 90 LRRM 2376, 2378 (D. Kan. August 21, 1975).

The defendants here have the burden of justifying their

refusal to disclose the subject material, 5 U.S.C. § 552(a)(4)(B), and their effort to do so must be assessed in the context of the "general philosophy of full agency disclosure." *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 136 (1975).

In resisting disclosure, defendants have cited four subsections of the Act which exempt certain material from the general disclosure requirements.

Exemption 5, 5 U.S.C. § 552(b)(5), states that the Act does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption has recently been construed in *N.L.R.B.* v. *Sears, Roebuck & Co., supra.* There the Court stated:

> Since virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation, and since the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein . . . , it is reasonable to construe Exemption 5 to exempt those documents, *and only those documents,* normally privileged in the civil discovery context.

Id., at 148-49. (Emphasis supplied) (Citations and footnote omitted). Deefndants in the instant case contend that the requested documents constitute a form of "attorney work product" exempt from discovery under normal civil procedure rules and, therefore, beyond the disclosure provisions of the Act. But, the Supreme Court has described this privilege in a manner that definitely disposes of defendants' claim of protection.

> Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.

E.P.A. v. *Mink*, 410 U.S. 73, 89 (1973), and cases cited. (Footnote omitted). *Title Guarantee Co.* v. *N.L.R.B.*, 90 LRRM 2849, 2852 (SD. N.Y. October 10, 1975).

As a result of its *in camera* inspection, the court finds that the subject affidavits contain purely factual, investigative material. Exemption 5 therefore does not insulate the requested documents from disclosure.

The other three exemptions cited by defendants are subsections of Exemption 7, which were completely overhauled by Congress in 1974.[3] The relevant provisions now state that the Act does not apply to:

> . . . investigatory records compiled for law enforcement purposes to the extent that the production of such records would
>
> (A) interfere with enforcement proceedings . . .
>
> (C) constitute an unwarranted invasion of personal privacy,
>
> (D) disclose the identity of a confidential source
>
> . . . .

5 U.S.C. § 552(b)(7)(A), (C) and (D).

The prime basis for defendants' refusal to disclose has been Exemption 7(A). Prior to the 1974 amendments, the affidavits presently sought by the plaintiff were not subject to compelled disclosure. *Wellman Industries, Inc.* v. *N.L.R.B.*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974) is precisely in point, barring the forced disclosure of affidavits obtained by N.L.R.B. investigators in connection with charges of unfair labor practices. *See also N.L.R.B.* v. *Clement Brothers Co.*, 407 F.2d 1027 (5th Cir. 1969); *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591 (D.P.R. 1967).

Very much in issue, however, is the effect of the recent changes in the statute. Defendants argue forcefully that

[3] As originally enacted Exemption 7 applied broadly to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1967).

the 1974 amendments to Exemption 7 cannot be interpreted as overruling existing case law. They offer statements of Senator Hart, a sponsor of the amendments, to the effect that the changes are "by no means a radical departure from existing case law under the Freedom of Information Act." 120 Cong. Rec. S9330 (daily ed. May 30, 1974). They note that, while Senator Hart did specify several cases from the District of Columbia Circuit which the amendments were intended to overrule, he did not mention any of the cases cited above which had established guidelines for disclosure of material relevant to N.L.R.B. hearings.

This court has reviewed the legislative history of the present Exemption 7 offered by the defendants and is simply not persuaded that the N.L.R.B. remained unaffected by the obviously substantial restrictions which the 1974 amendments put on invocation of this exemption. The remarks of various Congressmen offered by the defendants provide only general guidance. The court cannot agree that the specification of certain precedents which the amendments were intended to overrule inevitably implies that unspecified areas of case law were intended to be left untouched. It is certainly clear that the amendments were intended to terminate what Congress considered an overly-expansive view by the courts of the exemption provisions of the Act. The refurbished Exemption 7 now requires an agency to "specify some harm in order to claim the exemption . . . ." 120 Cong. Rec. H10868 (daily ed. Nov. 20, 1974) (Remarks of Congressman Reed of New York).

The court agrees with Judge Gagliardi's approach in *Title Guarantee, supra,* that claims of protection under Exemption 7 must be examined individually and the specific harm alleged to the agency weighed on a case by case basis. In this case, plaintiff by agreement in open court sought

only the affidavits of witnesses whom the government intended to call at the scheduled hearing before the Administrative Law Judge of the N.L.R.B. At the time of the hearing on the merits in this case, the scheduled N.L.R.B. hearing was less than three working days away. At the time this court issued its order requiring the defendants to make disclosure, less than twenty-four hours remained before the hearing. Defendants concede that, after the testimony of the witnesses at the scheduled N.L.R.B. hearing, plaintiff would be given copies of the requested affidavits for use in cross-examination. No evidence was offered by defendants specifying the harm which would fall upon the N.L.R.B. by a compelled disclosure of these affidavits on Monday, February 23, 1976 instead of the following morning.

Clearly, revealing these affidavits would not—to use the language of the statute—"interfere with enforcement proceedings" in the N.L.R.B. action pending against the plaintiff. Agency investigation was completed, the witnesses subpoenaed, and the hearing scheduled to go forward.[4]

Nor, on the specific facts of this case, will the precedent set here in any way compromise the ability of the defendants to secure cooperation from witnesses in future cases. To repeat, only the affidavits of those witnesses who have

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[4] This court is prepared to concede that, on different facts, a more compelling case for harm might be made. For example, if the agency could show that disclosure of witnesses' names and testimony weeks or months before a hearing could result in retributive action by the employer, or threats which might prevent the witness from testifying, "interference" might be found. However, there has been no attempt to show such a possibility in this case. Further, the timing in this case virtually precludes such a possibility. At the time of the issuance of this court's order, less than a day remained before the hearing. This decision requires the witness to endure for an additional day the consequences, if any, which his public testimony will bring about. Nothing on this record indicates that this factor would have a deterrent effect on available testimony.

already committed themselves to airing the contents of their affidavits publicly will be disclosed. In any event, these affidavits would be available to plaintiff immediately after direct examination which had been scheduled to take place twenty-four hours after the issuance of the court's disclosure order. This decision drags no witness into the limelight. A future witness in a subsequent unrelated N.L.R.B. action may confide his experiences to the N.L.R.B. investigator with the full assurance that his statements will remain closed to public view until he has committed himself, or resigned himself, to testifying about them in an open hearing, after which testimony his affidavit is subject to disclosure in any event.

In reaching this conclusion this court is in agreement with recent district court decisions closely in point. *Poss* v. *N.L.R.B.*, 91 LRRM 2232, (D. Colo., December 17, 1975); *N.L.R.B.* v. *Hardeman Garment Corp.*, 91 LRRM 2055, (W.D. Tenn. November 25, 1975); *Title Guarantee Corp.* v. *N.L.R.B.*, 90 LRRM 2849, (S.D. N.Y. October 10, 1975), *stay pending appeal denied*, 90 LRRM 3238, (November 28, 1975). *But see AMF Head Division of AMF Inc.* v. *N.L.R.B.*, CA No. 76-F-124 (D.Colo. February 12, 1976); *Harvey's Wagon Wheel, Inc.* v. *N.L.R.B.*, No. C-75-2487 SAW (N.D. Cal. February 5, 1976); *Climax Molybdenum Company* v. *N.L.R.B.*, 90 LRRM 3126 (D. Colo. November 14, 1975).

No authoritative decision from any Court of Appeals on the issue in this case, subsequent to the 1974 amendments to the Act, has been brought to this court's attention. Defendants' counsel stated during oral argument that some or all of the district court decisions contrary to their position had been or would be appealed. It is worth noting that two of these cases, *Title Guarantee* and *Poss*, went beyond this court's holding and appear to require the disclosure of the statements of all persons giving evidence against the party seeking access.

The two remaining claims by the defendant—that disclosure in this case is pre-empted by Exemptions 7(C) and (D)—are similarly without merit. Exemption 7(C) forbids revealing investigatory records when the production would "constitute an unwarranted invasion of personal privacy." This court can state from its *in camera* review of the subject affidavits that they pertain only to the dispute between Local 1291 and the plaintiff. No matters of a personal nature involving any witness' right to privacy are involved. For an enumeration of matters which do fall within the "privacy" exemption, see *Rural Housing Alliance* v. *U. S. Department of Agriculture,* 498 F.2d 73 (D.C. Cir. 1974) (information concerning marital status, legitimacy of children, medical conditions, family fights and the like).

Exemption 7(D) prevents compelled production of material which would "disclose the identity of a confidential source." Defendants state that they have told informants that their affidavits will not be made public unless and until they have testified at the N.L.R.B. hearing. They argue that this assurance has made these witnesses in some sense confidential sources. This court does not agree. The persons in questions have committed themselves to testifying in public. At the time of the hearing on the instant matter the subpoenas for these witnesses had already issued (unless the agency felt confident the witness would not require one), and the hour of truth was virtually at hand. No accepted definition of the term "confidential" could at that point describe the persons whose affidavits this court has ordered revealed.

In conclusion, then, this court holds that the defendants in this case have failed to specify any significant or credible harm which disclosure of the requested documents might work. They have thus failed to carry the burden of justifying their refusal to disclose.

III.

Having concluded that these requested documents must be produced, the court turns to the second question—the remedial powers of the court upon failure or refusal to comply. The crucial issue is whether this court has the power to enjoin the pending administrative proceeding unless and until the defendants comply with the order to disclose.

It seems clear—and the defendants do not dispute—that, given the proper circumstances, a district court may enjoin an agency proceeding for failure to comply with the disclosure requirements of the Act. *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1 (1974), although it denied the power of the court to enjoin renegotiation proceedings, made the general point that

> [w]ith the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

Id. at 20. Among these powers, as was clear from the context of the Court's remarks, is the power to enjoin an agency proceeding. *See also Sears, Roebuck & Co.* v. *N.L.R.B.,* 473 F.2d 91, 93 (D.C. Cir. 1972), *cert. denied,* 415 U.S. 950 (1974).

The issue, given this general power, is whether the circumstances create a possibility of serious and irreparable harm, sufficient to justify the concededly extraordinary step of enjoining the agency proceeding. At present, the district courts appear to be as split on this issue as they are on the appropriate scope of Exemption 7. *Compare Title Guarantee, supra, with General Cigar Co., Inc.* v. *Nash,* 89 LRRM 2863 (D. D.C. July 5, 1975) and *AMF Head Division of AMF Inc.* v. *N.L.R.B., supra.*

This court is persuaded that failure to enjoin the N.L.R.B. hearing until defendants have made the required disclosure

would work irreparable harm on the plaintiff. The core allegation made by the charging party is that plaintiff permanently discharged nine employees for their union activities. Several months have passed since their dismissal. If plaintiffs are found to have illegally dismissed these persons they may be required to reinstate the employees with full back pay. Their inability to review the statements of witnesses who will testify against them—which this court has found they have a *right* to do—substantially compromises their ability to prepare adequately for this hearing. In addition, review of these affidavits may convince the plaintiff to enter into some less adversarial stance in regard to these charges, with a possible disposition of the case without a hearing. Finally, if plaintiffs are deprived of these affidavits now and proceed to a hearing resulting in a judgment which they later successfully appeal on the ground that they should have been given the affidavits, they may be forced to undergo the entire hearing process again on remand. All these factors convince the court that agency proceedings must be enjoined until defendants have complied with the order to disclose.

IV.

For these reasons this court on February 23, 1976 issued the order attached hereto and marked Appendix A.

(s) (Illegible) TAURO
United States District Judge

APPENDIX C

PROVISIONS OF THE FREEDOM OF INFORMATION ACT, AS AMENDED, 5 U.S.C. §552

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall seperately state and currently publish in the Federal Register for the guidance of the public-

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, t.. public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed

published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if-

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the

responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall-

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) in unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request-

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately

examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are-

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include-

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a) (4) (f), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a list of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) (E), (F), and (G). Such report shall also include a description of the efforts undertaken by the department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive

department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

SECTIONS 8(a) (1), (3), (4), and (5) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U.S.C. §§151 (a) (1), (3), (4), AND (5)

Unfair labor practices

(8) (a) It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

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(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to

rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

RULES AND REGULATIONS OF THE
NATIONAL LABOR RELATIONS BOARD, SERIES 8,
AS AMENDED. 29 C.F.R. §§102.117-118

Subpart K-Records and Information

Sec. 102.117 *Board materials and formal documents available for public inspection and copying; requests for described records; time limit for response; appeal from denial of request; fees for document search and duplication; files and records not subject to inspection*-(a) (1) The following materials are available to the public for inspection and copying during normal business hours: (i) all final opinions and orders made in the adjudication of cases; (ii) administrative staff manuals and instructions that affect any member of the public (excepting those establishing internal operating rules, guidelines, and procedures for the investigation, trial, and settlement of cases); (iii) a record of the final votes of each member of the Board in every agency proceeding; and (iv) a current

index of final opinions and orders made in the adjudication of cases. Items (i) through (iv) are available for inspection and copying during normal business hours at the Board's offices in Washington, D.C. Items (ii) and (iv) are also available for inspection and copying during normal business hours at each regional, subregional, and resident office of the Board. Final opinions and orders made by regional directors in the adjudication of representation cases pursuant to the delegation of authority from the Board under section 3(b) of the act are available to the public for inspection and copying in the original office where issued.

(2) Copies of forms prescribed by the Board for the filing of charges under section 10 or petitions under section 9 may be obtained without charge from any regional, subregional, or resident office of the Board.

(b) (1) The formal documents constituting the record in a case or proceeding are matters of official record and, until destroyed pursuant to applicable statutory authority, are available to the public for inspection and copying during normal business hours, at the appropriate regional office of the Board or at the Board's office in Washington, D.C., as the case may be.

(2) The executive secretary shall certify copies of the formal documents upon request made a reasonable time in advance of need and payment of lawfully prescribed cost.

(c) Requests for the inspection and copying of records other than those specified in subsections (a) and (b) of this section must be in writing and must reasonably describe the record in a manner to permit its identification and location. The envelope and the letter should be clearly marked to indicate that it contains a request for records under the Freedom of Information Act (FOIA). The request must contain a specific statement assuming financial liability in accordance with subparagraph (2) (iv) of this subsection, for the direct costs of the search for the requested records and their

duplication. If the request is for records in a regional or subregional office of the agency, it should be made to that regional or subregional office; if for records in the office of the general counsel and located in Washington, D.C., it should be made to the Freedom of Information officer, office of the general counsel, Washington, D.C.; and if for records in the offices of the Board in Washington, D.C., to the executive secretary of the Board, Washington, D.C. Requests made to other than the appropriate office will be forwarded to that office by the receiving office, but in that event the applicable time limit for response set forth in subsection (c)(2) shall be calculated from the date of receipt by the appropriate office.

(c) (2) (i) Within 10 working days after receipt of a request by the appropriate office of the agency a determination shall be made whether to comply with such request, and the person making the request shall be notified in writing of that determination. If the determination is to comply with the request, the records shall be made promptly available to the person making the request, upon payment of any charges due in accordance with the provisions of subparagraph (iv) of this subsection. If the determination is to deny the request, the notification shall set forth the reasons therefor and the name and title or position of each person responsible for the denial, and shall notify the person making the request of the right to appeal the adverse determination under the provisions of subparagraph (ii) of this subsection.

(ii) An appeal from an adverse determination made pursuant to subparagraph (i) of this subsection must be filed within 20 working days of the receipt by the person of the notification of the adverse determination where the request is denied in its entirety; or, in the case of a partial denial, within 20 working days of the receipt of any records being made available pursuant to the request. If the adverse determination was made in a regional office, a subregional office, or by the Freedom of Information officer, office of the general

counsel, the appeal shall be filed with the general counsel in Washington, D.C. If the adverse determination was made by the executive secretary of the Board, the appeal shall be filed with the chairman of the Board in Washington, D.C. Within 20 working days after the receipt of an appeal the chairman of the Board or the general counsel, as the case may be, shall make a determination with respect to such appeal and shall notify the person in writing. If the determination is to comply with the request, the records shall be made promptly available to the person making the request, upon receipt of payment of any charges due in accordance with the provisions of subparagraph (iv) of this subsection. If on appeal the denial of the request for the records is upheld in whole or in part, the person making the request shall be notified of the reasons for the determination, the name and title or position of each person responsible for the denial, and the provisions for judicial review of that determination under the provisions of 5 U.S.C. section 552 (4) (B). Even though no appeal is filed from a denial in whole or in part of a request for records by the person making the request, the chairman of the Board or the general counsel may, without regard to the time limit for filing an appeal, *sua sponte* initiate consideration of an adverse determination under this appeal procedure by written notification to the person making the request. In such event the time limit for making the determination shall commence with the issuance of such notification.

Sec. 102.118 *Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony.*— (a) Except as provided in section 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or em-

ployee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D.C., and in the control of the general counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the chairman of the Board if the person is in Washington, D.C., and subject to the supervision or control of the Board; or of the general counsel if the person is in a regional office of the agency or is in Washington, D.C., and subject to the supervision or control of the general counsel. A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any *subpoena ad testificandum* or *subpoena duces tecum*, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such person or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule.

(b)(1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge *in camera*. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholding, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining

the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness.

(c) The provisions of subsection (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to section 102.69(d) and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the administrative law judge under subsection (b) of this section shall be exercised by the hearing officer presiding.

(d) The term "statement" as used in subsections (b) and (c) of this section means: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

APPENDIX D

December 29, 1975

(LETTERHEAD - MORGAN, BROWN, KEARNS & JOY)

Robert S. Fuchs, Esq.
Regional Director
National Labor Relations Board
Region One
15 New Chardon Street
Boston, Massachusetts 02114

Re: Goodfriend Western Corp.
d/b/a Wrangler Wranch
1-CA-11087

Dear Mr. Fuchs:

As you are aware, pursuant to charges filed in the above matter on October 3 and 6, 1975 complaint was issued over your signature on December 3, 1975 setting a hearing date of February 24, 1976.

Pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552, request is hereby made that copies of all written statements, signed or unsigned, contained in the Regional case file, resulting from Board interviews of witnesses offered by the charging party or otherwise resulting from investigation of the charge, be made available for inspection and copying, including any such statements taken subsequent to the issuance of the complaint.

Your prompt response to this request would be appreciated.

Very truly yours,
s/Harold N. Mack

HNM/EF

[LETTERHEAD - NATIONAL LABOR RELATIONS BOARD]
(SEAL)

February 2, 1976
Re: Goodfriend Western Corp.
d/b/a Wrangler Wranch
Case No. 1-CA-11087

Harold N. Mack, Esquire
Morgan, Brown, Kearns & Joy
One Boston Place
Boston, Massachusetts 02108
Dear Mr. Mack:

Your appeal from the Acting Regional Director's refusal to furnish information you had requested by letter dated December 29, 1975, has been duly considered.

The appeal is denied substantially for the reasons set forth in the Acting Regional Director's letter of December 30, 1975. With respect to your request for "all written statements," as set forth by the Acting Regional Director, it is our position that such information is exempted from disclosure pursuant to exemption 7(A), (C) and (D) of the Freedom of Information Act (hereafter, "FOIA"). In this regard, if this Agency were forced to disclose the above-requested material, we could no longer be guaranteed the voluntary public cooperation that is vital to the orderly processing of our investigations. Furthermore, the loss of voluntary public cooperation would severely hamper, if not make impossible, our capability to reach a thoughtful and successful conclusion in our investigations of unfair labor practice allegations. It is our opinion that the general public would no longer be willing to step forward in an area as sensitive as an unfair labor practice investigation if it were known that the information given was not kept in strict confidence. Therefore, in order to assure the sanctity of our present and future enforcement proceedings, this Agency must be able to convince our sources that their identities, as

well as any information forthcoming, will be held in the strictest confidence. See *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591 (D.C.P.R.); *Clement Brothers Co.* v. *N.L.R.B.*, 282 F. Supp. 540 (D.C. Ga.), affd., *N.L.R.B.* v. *Clement Brothers Co.*, 407 F.2d 1027 (C.A. 5); *Wellman Industries, Inc.* v. *N.L.R.B.*, 490 F2d 427 (C.A. 4), cert. den., 419 U.S. 834; cf., *N.L.R.B.* v. *Scrivener*, 405 U.S. 117; *N.L.R.B.* v. *Golden Age Beverage Co.*, 419 F.2d 26 (C.A. 5). See also *Kaminer* v. *N.L.R.B.*, ____ F. Supp. ____, 90 LRRM 2269 (S.D. Miss., 1975). Further, it is our position that the above-requested information is exempted from disclosure pursuant to FOIA exemption 5. Anytime an investigator takes an affidavit or statement, during an unfair labor practice investigation, it is done in anticipation of trial and thus must be viewed as the attorney's work product, which is not normally discoverable in our Agency's proceedings. See *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132. Moreover, even if the investigation did not warrant a finding that an unfair labor practice had been committed, the affidavits and/or statements, as part of the attorney's work product, would still have to be used by the Regional Director in making the administrative determination of whether or not issuance of complaint was warranted. See *Brockway* v. *Dept. of the Air Force*, 518 F.2d 1184 (C.A. 8, 1969).

We would also like to point out that it is well settled that the FOIA was never intended to allow either a Charging Party or a Respondent in an NLRB proceeding any greater access to our file contents than would normally be available through direct litigation with our Agency. See *N.L.R.B.* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 857-860 (C.A. 2, 1970), cert. den., 402 U.S. 915.

Finally, with respect to your contention that *Title Guarantee Co.* v. *N.L.R.B.* (D.C.S.D.N.Y., 1975) is dispositive of the matter herein, please see *Climax Molybdenum Co.* v. *N.L.R.B.*, (D.C. Col., 1975) and be advised that *Title Guarantee Co.* has been appealed.

Robert E. Allen, at the direction of and pursuant to the policies established by General Counsel John S. Irving, is responsible for the determination that the records you requested are privileged from disclosure under the FOIA.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

John S. Irving

General Counsel

By s/Robert E. Allen
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 1

APPENDIX E
District Court Decisions Ordering Disclosure of Witness' Statements

Barnes & Noble Bookstores v. *NLRB*, ____ F. Supp. ____, 92 LRRM* 2169 (S.D.N.Y. 1975)

Cessna Aircraft Co. v. *NLRB*, 405 F. Supp.1042, 90 LRRM 2376, 3280, 3379 (D. Kansas, 1975)

Committee On Masonic Homes v. *NLRB*,** ____ F. Supp. ____, 92 LRRM 2797 (E.D. Pa., 1975)

Deering Milliken, Inc. v. *Nash*, ____ F. Supp. ____, 90 LRRM 3138 (D.S. Carol., 1975)

Goodfriend Western Corp. v. *Fuchs*, 411 F. Supp. 454 , 91 LRRM 2454, 92 LRRM 2461 (D. Mass., 1976) *Reversed* ____ F.2d ____, 92 LRRM 2466 (1st Cir. 1976)

Kaminer v. *NLRB*, ____ F. Supp.____, 90 LRRM 2269, 3338 (S.D. Miss., 1975)

Local 32 v. *Irving*, ____ F. Supp. ____, 91 LRRM 2513, 92 LRRM 2437 (W.D. Wash., 1976)

Maremont Corp. v. *NLRB*, ____ F. Supp. ____, 91 LRRM 2645, 2804 (W.D. Okla., 1976)

McDonnell Douglas Corp. v. *NLRB*, ____ F. Supp. ____, 92 LRRM 2072 (C.D. Cal., 1976)

NLRB v. *Hardeman Garment Corp.*, 406 F. Supp. 510 ., 90 LRRM 3343, 91 LRRM 2055, 2335, 2425 (W.D. Tenn. 1975-6)

Poss v. *NLRB*, ____ F. Supp. ____, 91 LRRM 2232 (D.D.C. 1975)

Robbins Tire & Rubber Co. v. *NLRB*, ____ F. Supp. ____, 92 LRRM 2586 (N.D. Ala., 1976)

Temple Eastex, Inc. v. *NLRB*, ____ F. Supp. ____, 92 LRRM 2915 (E.D. Tex., 1976)

Title Guarantee Co. v. *NLRB*, 407 F. Supp. 498 , 90 LRRM 2849, 3238 (S.D.N.Y., 1975), *Reversed*, ____ F.2d ____, 91 LRRM 2993 (2d Cir. 1976)

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*("Labor Relations Reference Manual," Bureau of National Affairs)
**(disclosure of Authorization cards)

District Court Decisions Holding
Witness' Statements Exempt From Disclosure

Atlas Ind. v. *N.L.R.B.* ___ F. Supp. ___, 91 LRRM 2676 (N.D. Ohio, 1976)

Baptist Memorial Hospital v. *N.L.R.B.** ___ F. Supp. ___, 92 LRRM 2645 (W.D. Tenn., 1976)

Capital Cities v. *NLRB*, 409 F. Supp. 971 , 91 LRRM 2565 (N.D. Calif., 1976)

Climax Molybdenum Co. v. *NLRB*, 407 F. Supp. 208 , 90 LRRM 3126 (D. Colo., 1975)

Electri Flex v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2143 (N.D. Ill., 1976)

Gerico, Inc. v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2713 (D. Colo., 1976)

Gimbel Bros. v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2733 (E.D. Pa., 1976)

Harowe Servo Controls, Inc. v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2572 (E.D. Pa., 1976)

Harvey's Wagon Wheel v. *NLRB*, ___ F. Supp. ___, 91 LRRM 2410 (N.D. Calif., 1976)

Hook Drugs, Inc. v. *NLRB*, ___ F. Supp. ___, 91 LRRM 2797 (S.D. Ind., 1976)

ITT American Electric v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2815 (N.D. Miss., 1976)

Jamco Int'l. v. *NLRB*, ___ F. Supp. ___, 91 LRRM 2446 (N.D. Okla., 1976)

Local 30, Waterproof Workers v. *Irving*, 408 F. Supp. 520 , 91 LRRM 2515 (E.D. Pa., 1976)

Marathon LeTourneau Co. v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2944 (S.D. Miss., 1976)

Mylan Pharmaceuticals, Inc. v. *NLRB*, 407 F. Supp. 1124, 91 LRRM 2354 (W.D. Pa., 1976)

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*(exempt under 7(D) only)

NLRB v. *Biophysics Systems, Inc.*, ___ F. Supp. ___, 91 LRRM 3079 (S.D.N Y., 1976) decided on authority of *Title Guarantee* (1st Cir. 1976)

Pacific Phototype, Inc. v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2560 (D. Haw., 1976)

Read's, Inc. v. *NLRB*, ___ F. Supp. ___, 91 LRRM 2722 (D. Md., 1976)

Sealand Terminal Corp. v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2952 (S.D. Miss., 1976)

Vegas Village Shopping Corp. v. *NLRB*, ___ F. Supp. ___, 92 LRRM 2683 (C.D. Calif., 1976)

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No. 76-51

In the Supreme Court of the United States

OCTOBER TERM, 1976

GOODFRIEND WESTERN CORP., D/B/A
WRANGLER WRANCH, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-27) is reported at 535 F. 2d 145. The opinion of the district court (Pet. App. 28-38) is reported at 411 F. Supp. 454.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1976 (Pet. App. 25). The petition for a writ of certiorari was filed on July 15, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the pre-trial disclosure of statements of employees and their representatives obtained by the National Labor Relations Board in the investigation of a pending unfair labor practice case would "interfere

with enforcement proceedings," so that the statements are exempt from disclosure, under Exemption 7(A) of the Freedom of Information Act.[1]

STATUTES INVOLVED

The full text of the Freedom of Information Act, as amended, 5 U.S.C. 552 ("the FOIA"), and the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), 29 U.S.C. 151, *et seq.* ("the NLRA"), are set out at pp. 39-48 of the petition.

STATEMENT

A. The Unfair Labor Practice Proceeding

On October 3, 1975, Local 1291, Retail Store Employees Union, associated with Retail Clerks International Ass'n, AFL-CIO ("the Union") filed an unfair labor practice charge with the First Region of the National Labor Relations Board ("the Board"). The charge alleged that Goodfriend Western Corporation ("the Company") had violated Section 8(a)(1), (3), and (5) of the NLRA, 29 U.S.C. 158 (a)(1), (3), and (5) by, *inter alia*, interrogating its employees concerning their union activities, restraining their access to union organizers, threatening them with discharge because they wished to join the Union, discharging approximately twelve employees because of their

[1]The same question is presented in *Title Guarantee Co.* v. *National Labor Relations Board*, No. 75-1880, pending on petition for a writ of certiorari.

The petition also seeks to raise (Pet. 2) the additional question whether the above-described statements are exempt from disclosure under Exemptions 7(C), 7(D), and 5 of the FOIA. In view of its holding that the matter sought herein was protected against disclosure by Exemption 7(A), the court of appeals had no occasion to reach these additional questions. However, should the petition be granted, we reserve the right to argue that the matter sought is also protected by Exemptions 7(C), 7(D), and 5.

union activities, and refusing to bargain with the Union, which had been designated as the collective bargaining representative of a majority of the employees. On December 3, 1975, the Regional Director, after investigation of the charge, issued a complaint, and set it for hearing on February 24, 1976.

By letter of December 29, 1975, the Company, pursuant to the FOIA, requested that the Regional Director make available for inspection and copying, "all written statements, signed or unsigned, contained in the Regional case file, resulting from Board interviews of witnesses offered by the charging party or otherwise resulting from investigation of the charge" (Pet. App. 55). The Acting Regional Director, by letter of December 30, 1975, denied the Company's request on the grounds that the information was privileged from disclosure by Exemptions 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5)(A), (C), and (D). The Company appealed to the Board's General Counsel. On February 2, 1976, the General Counsel denied the appeal for substantially the reasons given by the Acting Regional Director and for the additional reason that the information was privileged from disclosure by Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5) (Pet. App. 56-58).

B. The FOIA Suit

Thereafter, the Company filed this suit to compel production of the statements and to enjoin the Board from proceeding in the unfair labor practice case until the requested information was made available. The district court, after hearing argument and making an *in camera* inspection of the requested statements,[2] ordered the

[2]The Company acknowledged that it sought only the affidavits of witnesses whom the Board intended to call at the scheduled hearing before the Administrative Law Judge (Pet. App. 33-34).

Board to turn them over to the Company, and enjoined the Board from proceeding with its unfair labor practice proceeding until it had done so (Pet. App. 28-29).

On the Board's appeal, the court of appeals reversed (Pet. App. 25-27). The court adopted the holding of the Second Circuit in *Title Guarantee Co. v. National Labor Relations Board*, 534 F. 2d 484, that "all statements of employees obtained in connection with unfair labor practice proceedings pending before the NLRB are exempt from disclosure under §552(b)(7)(A)" (Pet. App. 26). The court rejected the Company's argument that this case was factually distinguishable from *Title Guarantee*, in that here the district court's order was limited to statements of witnesses who had already committed themselves to testifying at a hearing that was scheduled to take place twenty-four hours after the order was issued. The court of appeals stated (Pet. App. 27):

> Even in this case we cannot rule out all possibility that the company may "be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * *." *Title Guarantee, supra*, slip op. at 2971. More important, whether such a possibility justifies denying all discovery of an employee's statements until after he testifies is a question that Congress has left to the Board.

ARGUMENT

This case presents the same issue presented in *Title Guarantee Co. v. National Labor Relations Board*, No. 75-1880, pending on petition for a writ of certiorari (see note 1, *supra*): whether the statements of prospective Board witnesses in a pending unfair labor practice case are protected against disclosure by Exemption 7(A) of the

FOIA. For the reasons set forth in the Board's brief in opposition in *Title Guarantee*,[3] there is likewise no occasion for further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1976.

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[3]We are serving petitioner with a copy of the Board's opposition in *Title Guarantee*.

DOJ-1976-09